

RECENT TRADE-RELATED DEVELOPMENTS IN THE BASEL CONVENTION

Communication from the Basel Convention on the Control of Transboundary
Movements of Hazardous Wastes and their Disposal

1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1988 and entered into force on 5 May 1992. As of 8 July 1997, 112 States and the European Economic Community are Parties to the Convention. Thus, the Basel Convention can be regarded as reflecting the views of the world community.

I. ENVIRONMENTAL OBJECTIVES OF THE BASEL CONVENTION

2. The Convention's overall objective is "to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes" (preamble). In order to achieve this aim, the following main principles can be identified:

- (a) reduction of the generation of hazardous wastes;
- (b) disposal of hazardous wastes as close as possible to their source of generation;
- (c) minimization of the generation of hazardous wastes in terms of quantity and hazardousness;
- (d) environmentally-sound management of hazardous wastes; and
- (e) prevention of illegal traffic.

3. The Convention provides for an elaborate control system which is based on the principle of written prior informed consent which imposes certain rights and duties on exporting, importing and transit states (Article 6).

II. TRADE-RELATED PROVISIONS

4. The Basel Convention contains two provisions referring to international trade.

A. The right of the Parties to the Basel Convention to ban the import of hazardous wastes

5. Every State has the sovereign right to ban the import of hazardous wastes. Parties to the Basel Convention exercising this right shall inform the other Parties of their decision through the Secretariat of the Convention (Article 4, paragraph 1(a)). Over 100 countries have notified the Secretariat of the Basel Convention that they have implemented a ban on the import of hazardous wastes.

6. Article 4, paragraph 1(b) stipulates that Parties shall prohibit or shall not permit the export of hazardous wastes or other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to Article 4, paragraph 1(a).

7. The right to ban (Article 4, paragraph 1(a)) is a general one which shall, if used, be applied vis-à-vis all other countries, equally between Parties and non-Parties to the Convention. It is therefore in compliance with the principle of non-discrimination. Also, doubts cannot be raised that a country exercising the right to ban is pursuing a protectionism policy. It follows from the definition of waste - "substances or objects which are disposed of or are intended to be disposed of, or are required to be disposed of by the provisions of national law" (Article 2) - that the substances in question are not goods which are produced to be commercialized but are generated as a result of the production process of other goods. The concept of protecting the waste generated locally has, therefore, no place within the logic of the Basel Convention.

B. The obligations of the Parties to the Basel Convention not to export or import from non-Parties to the Convention

8. One of the main objectives of the Basel Convention is to control the transboundary movements of hazardous wastes in order to avoid the negative effects on health and the environment which could result from the movements of such wastes and to guarantee their proper handling from their generation to their final disposal.

9. It was clear during the negotiations of the Basel Convention that permitting a Party to deal with non-Parties would be a valve through which the Party could derogate from the obligations of the Basel Convention, thus facilitating the movement and disposal of hazardous wastes without any kind of guarantee and safety for human health and the environment. Therefore, and also to encourage non-Parties to ratify the Convention, Article 4, paragraph 5 was included in the Convention:

"A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party."

10. Directly linked to this provision is Article 11, permitting Parties to deal with non-Parties under the condition of concluding bilateral, regional or multilateral agreements or arrangements. It reads:

"1. Notwithstanding the provisions of Article 4, paragraph 5, Parties may enter into bilateral, multilateral or regional agreements or arrangements regarding transboundary movements of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally-sound management of hazardous wastes and other wastes as required by this Convention. The agreements or arrangements shall stipulate provisions which are not less environmentally-sound than those provided for by this Convention in particular taking into account the interests of developing countries.

"2. Parties shall notify the Secretariat of any bilateral, multilateral or regional agreements or arrangements referred to in paragraph 1 and those which they have entered into prior to the entry into force of this Convention for them, for the purpose of controlling transboundary movements of hazardous wastes and other wastes which take place pursuant to such agreements provided that such agreements are compatible with the environmentally-sound management of hazardous wastes and other wastes as required by this Convention."

11. The above quoted provisions of Article 11 allow the Parties to the Convention to deal with non-Parties on the basis of parallel rules to the Basel Convention. Export to and import from non-Parties, therefore, is only permitted under the condition that it is based on rules not less environmentally-sound than the ones of the Convention. This contributes to the control and reduction of transboundary movements of hazardous wastes and, at the same time, enhances the principle of non-discrimination and equal treatment.

12. Therefore, in relation to the control of transboundary movements of hazardous wastes Parties and non-Parties will have to respect standards recognized as essential by the international community for the protection of the environment. Trade restrictions against non-Parties do not only aim to induce non-Parties to accede to bilateral, multilateral and regional agreements, but also to achieve the aim of non-discrimination.

C. Decision III/1: the Ban Amendment

13. Recognizing the increased desire and demand of the international community for the prohibition of transboundary movements of hazardous wastes and their disposal especially in developing countries, the second meeting of the Conference of the Parties decided to immediately prohibit all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD countries, and to phase out such movements for recycling or recovery operations by 31 December 1997 (Decision II/12). This transitional period has been seen as necessary to enable OECD countries to take appropriate measures consistent with the environmentally-sound management of such wastes.

14. The third meeting of the Conference of the Parties adopted an amendment of the Convention incorporating this ban in the Basel Convention. The amendment (Decision III/1) obligates Parties and other States which are members of OECD, EC, Liechtenstein to prohibit all transboundary movements of hazardous wastes which are destined for final disposal to other states. Transboundary movements of hazardous wastes which are destined for recovery or recycling have to be phased out, and prohibited as of that date, by 31 December 1997.

15. Any Party is free to ask to be included in Annex VII. The Conference of the Parties as the sovereign body of the Convention would have to decide on any such requests. Indeed, at its fourth meeting (Malaysia, 6-10 October 1997), the Conference will already have to consider such requests. If need be, more specific criteria will have to be developed in the course of the negotiations, in the light of the objectives of the Convention.

16. The Technical Working Group, a subsidiary body under the Basel Convention, has classified and characterized which materials are to be considered "hazardous wastes" under the Convention and, therefore, will fall under the ban amendment. The Technical Working Group has proposed that the wastes placed on a "List A" are wastes characterized as hazardous under Article 1 paragraph 1(a) of the Convention. The wastes on "List B" would not be characterized as hazardous under Article 1 paragraph 1(a) of the Convention unless they contain Annex I material to an extent causing them to exhibit one or more Annex III hazardous characteristics. However, if a waste on List B is considered to be hazardous by the legislation of a Party of export, import or transit, this waste would nevertheless be subject to the control regime of the Convention (Article 1 paragraph 1(b)). A review mechanism has been established which makes it possible to add wastes to List A or B or to withdraw wastes from those lists.

17. The fourth meeting of the Conference of the Parties will consider the outcome of the work of the Technical Working Group and how the lists of wastes should be integrated in the framework of the Convention.

18. The ban amendment has to be ratified by three fourths of the Parties. Until now, it has been ratified only by Finland and Norway and, therefore, has not yet entered into force.

19. The ban amendment, which was adopted by consensus, is based on the recognition that the movement of hazardous wastes, especially to developing countries, has a high risk of not constituting environmentally-sound management of hazardous wastes. The concept of high risk of affecting the

environment is part of the amendment and will be inserted as a new preambular paragraph in the Convention.

20. The ban is expected to support efforts of countries to reduce transboundary movements, to consolidate policies on treatment and disposal of wastes as close as possible to the source of generation, and to act as an incentive to introduce cleaner production methods in industrial processes, which minimizes the generation of hazardous wastes.